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7 **UNITED STATES DISTRICT COURT**
8 **DISTRICT OF NEVADA**
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10 MANNY D. SELFAISON, *et al.*,

11 Plaintiffs,

12 v.

13 FIRST NATIONAL BANK OF
14 ARIZONA, *et al.*,

15 Defendants.

Case No. 2:09-CV-01918-KJD-RJJ

ORDER

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17 Presently before the Court is Defendant Phillip Kafka's Motion to Dismiss (#6). Plaintiffs
18 filed a response in opposition (#8) to which Defendant replied (#9).

19 **I. Background**

20 On or about February 1, 2007, Plaintiffs obtained a loan for which they signed a promissory
21 note secured by a deed of trust on real property located at 6476 Robusta Court, Las Vegas, Nevada
22 89141. On or about February 11, 2009, a Notice of Breach and Default and of Election to Cause Sale
23 of Real Property Under Deed of Trust was recorded. On September 10, 2009, the trustee of the deed
24 of trust held a trustee's sale and obtained a Trustee's Deed on or about September 21, 2009.
25 Plaintiffs then served a notice of right of rescission on Defendant First National Bank of Arizona.
26 Plaintiff's Amended Complaint (#4) was filed on December 2, 2009 asserting causes of action for

1 rescission under 15 U.S.C. § 1635(a) and (i), declaratory judgment and lack of standing. Defendant
2 Kafka now moves to dismiss asserting that Plaintiffs' right of rescission under 15 U.S.C. § 1635 was
3 cut off upon sale of the property and that Plaintiffs' claims for declaratory relief and lack of standing
4 fail to state a claim for relief.

5 II. Analysis

6 A. 15 U.S.C. § 1635

7 15 U.S.C. § 1635 (f), which expressly applies to section 1635 (a) and (i), states "[a]n
8 obligor's right of rescission shall expire three years after the date of the consummation of the
9 transaction or upon the sale of the property, whichever occurs first[.]" Plaintiffs allege that they sent
10 their Notice of Rescission on September 24, 2009, fourteen days after the property was sold to Kafka.
11 Assuming there was ever a right to rescission under the alleged facts of this action, it expired upon
12 the sale of the property on September 10, 2009. Accordingly, Plaintiffs' claims for rescission are
13 barred by 15 U.S.C. § 1635(f). Plaintiffs' claim for declaratory relief was based upon Plaintiffs'
14 right of rescission. Since the rescission claim is foreclosed, the Court must also dismiss the claim for
15 declaratory relief.

16 B. Standing

17 Plaintiffs' cause of action for standing in this case is based on the argument that Defendant,
18 Mortgage Electronic Registration Systems ("MERS"), lacked standing to foreclose on the property.
19 However, based on the documents attached to Plaintiffs' amended complaint and those documents of
20 which the Court can properly take judicial notice, MERS, in fact, held the note and deed of trust at
21 issue in this action. Furthermore, MERS properly designated Executive Trustee Services, LLC, to
22 act as Trustee under the deed of trust. Under Nevada law, the trustee may properly conduct the
23 foreclosure sale. The procedure for conducting a trustee's foreclosure sale in Nevada is set forth in
24 NRS § 107.080 *et seq.* The foreclosure process is commenced by the recording of a notice of breach
25 and election to sell by the trustee. NRS § 107.080(2)(b). After the notice of default is recorded, the
26 trustee must wait three months. NRS § 107.080(2)(c). The trustee must then give notice of the time

1 and place of the sale. NRS § 107.080(4). A sale is conducted, monies are bid, and a trustee's deed is
2 issued. Foreclosure procedures must be followed or the sale will be invalid. See Rose v. First Fed.
3 Sav. and Loan, 105 Nev. 454, 777 P.2d 1318 (1989) (trustee's sale invalid where notice requirements
4 not satisfied).

5 Section 107.080 provides that the “power of sale” is conferred upon the “trustee.” Section
6 107.080(b) expressly states that the trustee can execute its power of sale once “[t]he beneficiary, the
7 successor in interest of the beneficiary or the trustee first executes and causes to be recorded in the
8 office of the recorder of the county wherein the trust property, or some part thereof, is situated a
9 notice of the breach and of his election to sell or cause to be sold the property to satisfy the
10 obligation.” Plaintiffs have failed to cite to any authority under Nevada law that a trustee's power of
11 sale is tied to the presentment of the original note to the debtor.

12 Additionally, at least under California law, an “allegation that the trustee did not have the
13 original note or had not received it is insufficient to render the foreclosure proceeding invalid.” Neal
14 v. Juarez, 2007 WL 2140640 (S.D. Cal. July 23, 2007) (citing R.G. Hamilton Corp. v. Corum, 218
15 Cal. 92, 97, 21 P.2d 413 (1933) and California Trust Co. v. Smead Inv. Co., 6 Cal.App.2d 432, 435,
16 44 P.2d 624 (1935)). See, e.g., Commercial Standard Ins. Co. v. Tab Constr., Inc., 94 Nev. 536, 583
17 P.2d 449, 451 (Nev.1978) (stating that Nevada courts often look to California law where Nevada law
18 is silent). Accordingly, the Court dismisses Plaintiffs’ claims.

19 C. Service under Rule 4 (m)

20 Plaintiffs’ amended complaint was filed on December 2, 2009. Federal Rule of Civil
21 Procedure 4(m) requires service of summons and complaint to be made upon a defendant 120 days
22 after the filing of the complaint. The 120 day time period for effecting service of the summons and
23 complaint upon Defendants First National Bank of Arizona and MERS expired no later than April 1,
24 2010. On April 6, 2010 and November 10, 2010, the Court ordered Plaintiffs to file proof of service
25 of the summons and complaint no later than November 24, 2010, and warned Plaintiffs that failure to
26 do so would result in the complaint against Defendants being dismissed without prejudice.

1 Plaintiffs have failed to file proof of service on Defendants, or to otherwise respond to the
2 Court's order. Therefore, the Court dismisses Plaintiffs' complaint without prejudice against
3 Defendants First National Bank of Arizona and MERS for failure to serve Defendants in compliance
4 with Rule 4(m).

5 III. Conclusion

6 Accordingly, IT IS HEREBY ORDERED that Defendant Phillip Kafka's Motion to Dismiss
7 (#6) is **GRANTED**;

8 IT IS FURTHER ORDERED that the Clerk of the Court enter **JUDGMENT** for Defendant
9 Kafka and against Plaintiffs;

10 IT IS FURTHER ORDERED that the complaint against First National Bank of Arizona and
11 MERS is **DISMISSED without prejudice** for failure to serve the amended complaint in accordance
12 with Rule 4 (m).

13 DATED this 24th day of February 2011.

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17 Kent J. Dawson
18 United States District Judge
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